



Appeal Decision

Site visit made on 15 September 2021

by Mrs H Nicholls FdA MSc MRTPI

An Inspector appointed by the Secretary of State

Decision date: 25 October 2021

Appeal Ref: APP/B1740/W/21/3274581

Kingfisher Park, Salisbury Road, Blashford, Ringwood, Hants BH24 3NX

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for planning permission.
 - The appeal is made by Kingfisher Park Management Ltd against New Forest District Council.
 - The application Ref 20/10103, is dated 21 January 2020.
 - The development proposed is barrier/gate at Kingfisher Park (vehicular only).
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Decision

1. The appeal is dismissed and planning permission is refused for barrier/gate at Kingfisher Park (vehicular only).

Application for costs

2. An application for costs was made by Kingfisher Park Management Ltd against New Forest District Council. This application is the subject of a separate Decision.

Main Issue

3. The main issue is whether the barrier would provide adequate public access to the recreational car park.

Background

4. Kingfisher Park was constructed under a permission granted in 2002¹, which was subject of a S106 planning obligation² (the S106). Amongst other things, the S106 sought the construction of a 'Recreational Car Park' (the Car Park), a footbridge and a footpath from the Car Park to the adjoining 'Amenity Land'. The Amenity Land comprises the Hurst Ponds and surrounding land which offer fishing and other similar opportunities. It forms part of the wider recreational area of the 'Blashford Lakes'; the management of which is governed by the Blashford Lakes Strategic Management Plan (2006).
5. A deed of variation (DoV)³ was made to link a varied planning permission to the S106. However, this did not fundamentally alter any of the obligations in the parent S106; a key purpose of which was to ensure the Car Park was open to the public every day throughout the year and to forever keep it in a reasonable state of repair.

¹ Planning permission reference: 01/72494

² S106 dated 11 April 2002

³ Dated 3 March 2003

6. The obligation to provide the footbridge transferred to the Council, but it does not appear to have ever been constructed. The Car park has been provided and appears to be accessible to the public, albeit not signed as such or particularly apparent within the context of its commercial surroundings. No formal Public Right of Way (PROW) has been dedicated through the estate or Car Park to link into the Amenity Land although a small, unmade path has been provided and appears to be well used. The Car Park and access road to Kingfisher Park remain in private ownership.
7. At some point following the construction of Kingfisher Park, a manual barrier was installed across its access road. I have little detail about the pattern of its use, but the evidence points to its closure after business opening hours (i.e. evenings and weekends) when staff remembered to do so. As there is also evidence of regular misuse of the Car Park and the adjoining car park serving Kingfisher Park, with occurrences of fly tipping and car racing, it must be assumed that the barrier has also often been left open on some evenings and weekends. It is claimed that the erection of the barrier, as an act of development, is now lawful by virtue of the passage of time. Aside its status as a lawful 'development' there is the matter of the breach of the S106.
8. On being alerted to the potential breach of the S106 through the inhibited access to the Car Park, the appellants sought to vary the S106 and DoV, through new variation applications. However, owing to the number of parties that would now need to sign a new Deed of Variation, this was subsequently found not to be a workable option. These applications remain undetermined.
9. The appellant seeks planning permission to install an alternative electronic barrier/gate (hereafter referred to as a barrier) to replace the existing manual barrier, albeit in a slightly different position. The intention is that the new barrier will be keypad operated outside of the hours of 0700 – 1800, with access codes provided within 24 hours of a request from anyone wishing to use the Car Park outside of these times. A pedestrian path would be provided around the barrier for unlimited access on foot.
10. The Council considers that it is incapable of determining the appeal application for the new barrier until such time as the S106 and DoV are varied, as any new permission would be in breach thereof. The appellant considers that any new permission for a barrier would override or 'trump' the existing S106, but that an instructive planning condition could be used to maintain public access to the Car Park. The appeal against non-determination has been made on this basis.
11. Subsequently, the Council has indicated that, had it been in a position to determine the appeal application, it would have refused it because the development would cause harm by limiting access to the Car Park that serves open space, footpaths and public rights of way that adjoin it, contrary to, in particular, Policies STR1 and ENV3 of the Local Plan Part One: Planning Strategy 2016-2036 (2020) (LPP1).

Reasons

12. Having considered the S106, I do not agree with the appellant that its wording is ambiguous in terms of the extent of public access it sought to achieve. When read straightforwardly and as a whole, the natural and ordinary meaning of the words in the S106 lead me to conclude that the Car Park and footpath were

required to be continually available, unless specifically closed for the allowable and restricted maintenance periods.

13. The appellant's claim that a new permission for a barrier could be granted, with appropriate conditions, is correct in one sense. Any permission would be separate to the original S106 but it would not nullify it. The S106 would still remain and an application to discharge or modify it would still need to be made through the formal process, though any permission with conditions or a new planning obligation could influence the decision on whether the original S106 still continued to serve a useful planning purpose.
14. However, the intent of the S106 to permit public access is understandable and still relevant today. Whilst I have considered the option to grant planning permission with the suggested condition on how the barrier should be used, I am not satisfied that it would confer the same simplicity and freedom of access to private land in the manner achieved by the existing S106, even if uninhibited pedestrian access were maintained. The National Planning Policy Framework sets out the tests for the use of planning conditions and requires that they should be necessary, directly related to the development, fairly and reasonably related in scale and kind to the development, enforceable, precise and reasonable in all other respects. The Planning Practice Guidance (PPG) indicates that⁴ "*Conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability*".
15. As the planning application site area excludes access through the privately owned estate road, a condition could not be used to confer public access rights. Consequently, in the absence of a suitably robust alternative, the appeal proposal would fail to provide adequate public access to the recreational car park, contrary to, in particular, Policy ENV3 of the LPP1 which, amongst other things, seeks to ensure new development is well connected to surrounding uses, and logically laid out so that different elements work well together in a manner that is safe to access, easy to navigate, convenient to use and that makes effective use of both developed land and open spaces.

Other Matters

16. I accept the genuine desire to prevent antisocial behaviour and fly tipping. However, alternative options such as physical alterations to the road layout or other electronic security mechanisms, such as CCTV, that may otherwise avoid conflict with the terms of the S106 do not appear to have been explored.
17. It has been suggested that the Council's failure to meet its own obligations in the S106 undermine its original purpose and that the length of time that the S106 has been breached, by both the appellant and the Council, prevents it from continuing to serve a useful planning purpose. As this S78 appeal seeks a new permission for a barrier, I cannot agree with these assertions or simply agree that the Limitations Act 1980 is of relevance to the appellant in this regard. Such factors rightly fall to be determined in relation to the modification or discharge of the S106 and DoV.
18. Similarly, whilst the paths from the Car Park to other areas of the Hurst Lakes may not have been dedicated as PROWs, this decision does not affect any

⁴ Paragraph: 009 (Reference ID: 21a-009-20140306)

future application for them being claimed and registered as such. This aspect falls outside of the scope of this appeal.

Conclusion

19. In view of the reasons set out above, and having regard to all other matters raised, including the local support for the proposal, the appeal is dismissed.

Hollie Nicholls

INSPECTOR